Right-Gard Corporation *and* Highway Truck Drivers and Helpers, Local 107. Cases 4-CA-11105 and 4-CA-11176

May 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 5, 1981, Administrative Law Judge James J. O'Meara, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Right-Gard Corporation, Montgomeryville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees because of their actual or suspected union activity.

WE WILL NOT discharge or lay off any employee in order to prevent employees from seeking to be represented by a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the free choice of any of the rights set forth above.

WE WILL immediately offer Calvin Duncan, Leonard Duncan, Bela Giczi, Anderson Mitchell, Rowena Wells, and Camille Smith full reinstatement to their former jobs with Right-Gard Corporation or, if such jobs no longer exist, each of them will be offered a substantially equivalent position, without loss of seniority or other rights, privileges, and benefits; and WE WILL make them whole, with

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We have particularly considered Respondent's contention that the hearing was tainted by the conduct of a witness, James Smith, who allegedly threatened and pushed other witnesses outside the courtroom while waiting to testify, and find that Smith's conduct does not warrant reversing the Administrative Law Judge's credibility resolutions. Furthermore, we deny Respondent's request that the Board either strike Smith's testimony or grant a new hearing as lacking in merit. In so finding we do not, of course, condone any misconduct in which James Smith may have engaged. The parties may choose to seek the appropriate civil or criminal remedies for such misconduct through the local law enforcement agencies or courts. In finding that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Calvin Duncan, we note that although Duncan was identified as "supervisor"of the third shift before his discharge on May 14, 1980, Respondent does not contend, nor does the record reflect, that Duncan is a supervisor within the meaning of Sec. 2(11) of the Act.

In setting forth the remedy for Respondent's unfair labor practices, the Administrative Law Judge failed to indicate that the payment of backpay shall be in accordance with the Board's discussion in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). We hereby correct his inadvertent error.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] We shall modify the Administrative Law Judge's recommended Order by adding par. 1(c) to order that Respondent cease and desist from violating the Act in any like or related manner. We shall also substitute a new notice for that of the Administrative Law Judge, containing language which conforms to par. 1(a) of the Administrative Law Judge's recommended Order.

interest, for all moneys each of them and Holly Joy Russell lost as a result of their discharges in 1980.

RIGHT-GARD CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES J. O'MEARA, JR., Administrative Law Judge: The amended consolidated complaint in this matter is based on two charges filed by Highway Truck Drivers and Helpers, Local 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereinafter referred to as the Union.[1]

The consolidated complaint, issued on July 24, 1980, alleges violations of Section 8(a)(1) and (3) of the Act in that Respondent discharged seven employees because they supported and assisted the Union in its organizational activities. Respondent denies that it has violated the Act.

A hearing was held in Philadelphia, Pennsylvania, on February 25, 26, and 27, 1981. At the close of the hearing, oral argument was waived. The parties were given leave to file briefs, which have been received and considered.

In consideration of the record in this case, including all competent oral and written evidence and the briefs and argument of counsel, I make the following:[2]

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent Right-Gard Corporation, a Pennsylvania corporation, is located in Montgomeryville, Pennsylvania. It is engaged in the manufacture of several plastic products, including street hockey equipment. During the year immediately prior, Respondent purchased goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this consolidated case.

II. THE LABOR ORGANIZATION

Highway Truck Drivers and Helpers, Local 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of the Act.

III. RESPONDENT'S BUSINESS

Right-Gard Corporation manufactures plastic sports equipment at a plant located in Montgomeryville, Pennsylvania. One of its principal products is street hockey equipment. The present "owner" of Respondent is Richard McGrath.[3] He became involved with the Company on October 27, 1979. The Company was indebted to the First Pennsylvania Bank, its principal creditor, in excess of $300,000. The bank "came to" McGrath and told him that, if he was interested in taking over the Company, the bank desired that he "take it" otherwise the bank would "close it down."

The Company had lost $207,000 in 1977, and had a negative net worth of $324,500. After McGrath took over the Company, it earned $57,000 in 1978 and $78,000 in 1979. It reported a loss of $29,500 in 1980.

On March 30, 1980, McGrath entered into an agreement with the bank whereby the bank agreed to write off $195,000 of a $500,000 outstanding loan balance and in turn McGrath agreed to pay 12-percent interest on the remaining balance which resulted in a $3,000 monthly interest payment.

Respondent operates at a negative net worth. It borrows money at a level based on 80 percent of its accounts receivable. Its monthly expenses are estimated at $100,000; accordingly, Respondent must have an average cash flow of $5,000 per day and to do so must therefore aggregate accounts receivable at an average of $6,250 per day.

In order to maintain such a financial balance of cash inflow and the accrual of receivables, Respondent must monitor its inventory of orders upon receipt and attempt to adjust its future expenses to a level where production and sales will enable the realization of a sufficient cash flow to meet the expenses.[4]

In both 1979 and 1980 Respondent operated two shifts plus a third shift on a seasonal basis. The third shift (11:30 p.m. to 7:30 a.m.) was operated in 1979 from the beginning of April to sometime during the summer of that year and again in 1980 from March until May 14.[5]

Respondent's barometer of future sales (backlog) displayed a drop in April 1980 when compared with the volume of such sales in April 1979. In 1979 the backlog in April reflected a level of $78,000 as compared to a level of $52,000 in April 1980. In the first 9 days of May

[1] An amendment of the complaint was allowed, although the 6-month statutory period provided in Sec. 10(b) of the Act had expired, since the amendment relates to the unfair labor practice alleged in the original complaint. *Daniel Construction Company, A Division of Daniel International Corporation*, 244 NLRB 704 (1979); *Staco, Inc.*, 244 NLRB 461 (1979). Further, Respondent's counsel was advised that, if the lateness of the amendment prejudiced his defense, ample time would be provided to overcome any such prejudice.

[2] The General Counsel has filed with his brief a motion to correct the transcript of the evidence in this case. He cites 22 specific points where he alleges transcribing errors. A reading of the transcript discloses numerous errors in addition to those set forth by the General Counsel. These errors, however, are deemed to be of no significance in determining the testimony of the witnesses and other material matters of record. In addition, G.C. Exhs. 11 and 13 are reflected in the original record of this case as having been admitted into evidence. Those exhibits were not offered nor received in evidence and the reporter's marking to the contrary is hereby stricken and they are deemed nonadmitted exhibits. For the reasons above recited, the motion of the General Counsel to correct the record is denied.

[3] McGrath characterized himself as the "owner" of the corporation. It is assumed that he acquired the outstanding stock of the Company and now owns or controls a majority of such stock.

[4] Total cash flow under these circumstances arises from borrowed funds measured by available accounts receivable and from cash flow produced by the receipt of 20 percent of the accounts receivable when paid.

[5] There is no evidence of third-shift history prior to 1979.

1979 the backlog was $59,219 and for the first 9 days of May 1980 it was $25,486.[6]

IV. THE UNION ORGANIZATIONAL EFFORTS

In late April 1980 Leonard Duncan, an employee of Respondent, contacted the union office for information regarding the procedure to undertake in order to obtain union representation for himself and other employees of Respondent. Shortly thereafter, and about the first week in May, a union representative met with Leonard Duncan and provided "representative designation cards" with which to solicit the designation of interested employees. Duncan was also advised on how to use the cards in his solicitation efforts. Between May 2 and May 6 Duncan obtained signed cards from 14 of the approximately 28 employees of Respondent. These employees were:

Danette Christman	Anthony Miller
Linda Cunningham	Lillieth Mullings
Leonard Duncan	Michael Owens
Bela Giczi	Holly Russell
Richard Grabenstetter	Camille Smith
Nancy Harlett	Katheren Sottanella
Michael Lawson	Rowena Wells

The signed cards were delivered to a union representative on May 7 or 8, and on May 9 the Union filed a representation petition with the Board.[7]

V. RESPONDENT'S KNOWLEDGE OF UNION ACTIVITY

On Monday, May 12, at or about 5 p.m., a representative of the National Labor Relations Board telephoned Respondent's office. The call was received by an employee, Alice Hienlien. All other office employees had left for the day and only James Smith, the second-shift foreman, was present in the office. The caller advised Hienlien of the Union's organizational plans and asked her if a letter had been received from the Union's attorney. Smith, upon inquiring of Hienlien as to the context of the call, which he had overheard, advised her to call Richard McGrath, Respondent's president, immediately. She reached McGrath at his home and advised him of the context of the call and gave McGrath the name and the phone number of the person calling.

At 8 p.m. on that evening McGrath called Smith at Respondent's plant. During the conversation, McGrath asked Smith for his opinion on eliminating the third shift. Smith advised McGrath that it was his opinion that the third shift should be eliminated and the personnel from that shift incorporated into the second shift because it was Smith's opinion that the third shift, with one supervisor and two production people, was unable to put out the production required from each shift. McGrath agreed with Smith and asked him to write a letter to McGrath stating those facts and also to write that Smith felt that the cut should be made due to the excessive cost of lighting and heating the building when compared with the amount of production of the shift. Smith wrote the letter that day and placed it on McGrath's desk. In the letter Smith wrote as follows:

> In my opinion, due to inflation and added cost of raw materials, the amount of production is non-sufficient for the cost of energy that is used to run the heavy molders. I suggest that the third shift be eliminated for the above reasons. As for the second shift I also feel that a cutback of two employees is essential to prevent a long layoff to the entire production force.

On May 14 Respondent received a letter dated May 8 from an attorney representing the Union, advising that a majority of the production and maintenance employees had designated Local 107 as their exclusive representative for the purpose of collective bargaining under the Act. McGrath contends that he was unaware of the Union's organizational activities at Respondent's plant until the receipt of the letter on May 14, from the union representative. He testified that he was in his office on Monday, May 12, long after Hienlien had departed and that her call to him could not have been on May 12. The letter from the union attorney was admittedly received on Wednesday, May 14. Hienlien testified that the letter was not received on the day after her call to McGrath but was received 2 days later. Smith was called by McGrath at 8 p.m., on May 12, and requested to prepare the memo regarding the third-shift termination. Smith testified that he wrote and dated the memo during his shift on May 12, which was the day he witnessed Hienlien's receipt of the call from the Board agent and her relay of that call to McGrath. McGrath does not deny receiving a call from Hienlien but contends it was Tuesday, May 13, and that he confused the Board agent making the call with a Labor Department representative with whom he was involved in a matter of overtime payment regarding an employee. Smith testified that the memo he wrote to McGrath on May 12 was, in essence, dictated by McGrath. The record does not disclose the reasons for Smith's concern about a cutback in the production force nor the source of his knowledge about the effect of inflation or added cost of raw materials and energy upon the Company's fiscal well-being. Such information and the language employed in the memo would more probably be authored by McGrath than by Smith.

McGrath also testified that on May 14, at or about noon, he was advised by an attorney, Mark Cornblatt, that the letter (which McGrath had not yet seen) from the National Labor Relations Board was more probably in regard to union organizational efforts and not related to the Department of Labor matter. Cornblatt was not called upon to corroborate this conversation and confirm McGrath's misunderstanding of the content of the NLRB telephone call, nor was Cornblatt shown to be unavailable to Respondent.

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[6] In the middle of June 1980 Respondent learned that its backlog records for prior months were underreported due to the default of the employee charged with maintaining such record. Respondent contends that, if its backlog record had been accurate, no economic necessity for discharging would have occurred. Thus, the financial posture of Respondent found, although not accurate, is that which Respondent allegedly believed existed.

[7] The representation case regarding the Union's petition for an election has been indefinitely postponed.

For these reasons I credit the testimony of Hienlien and Smith and find that Respondent learned of the Union's organizing activities on May 12 at or about 5 p.m.

VI. THE DISCHARGES

Near the end of April 1980, Smith told McGrath that he needed additional employees on the second shift. McGrath said he would not hire more employees since the complement at that time exceeded 31 employees, excluding supervisors. Smith physically counted the nonsupervisory employees as reflected by their timecards contained in the timecard rack and told McGrath that there were 28 such nonsupervisory employees. McGrath gave Smith permission to hire two additional employees, which Smith did on or about May 5.

On May 13 Smith went to the plant about 10 a.m. in order to resolve a problem with one of the molding machines. In a telephone conversation with McGrath on that day regarding authority to buy a part for a defective machine, Smith was told to lay off two employees from the second shift. McGrath did not give Smith his reasons for directing such a layoff but stated that he would speak to him later in the day in that regard. Smith laid off two employees whom he considered the least productive. At 5 p.m. that day McGrath; Dennis Pickering, first-shift foreman; Larry Bennett, plant superintendent; Dick Fitzgerald, shipping and receiving foreman; and Smith met at the plant. McGrath told those in attendance that the employees at the plant had petitioned for a union and that he wanted to consult with his supervisory personnel on how to fight the union organizing campaign.

On the following day, May 14, McGrath met with Pickering, Bennett, and Smith and said that he was going to do everything in his power to get rid of as many people as he thought necessary to insure that the Union could not win a majority in a union representation election. He stated that he was going to go through the timecard and payroll records to determine who had lost a lot of time and who was absent frequently because, on the advise of his counsel, that was the best way to prevent the Labor Board from coming back and saying that he had fired these people because of union activities. At this time he also informed those present that he had learned that Leonard Duncan was involved with the Union and was passing out union cards to employees. He stated that he was going to get "rid" of Leonard Duncan on a phony charge no matter how long it took him.

McGrath and Bennett denied that such a meeting occurred. Pickering and Fitzgerald, who also testified, were not questioned about the meeting. McGrath also denied that he gave Smith permission to hire the two employees Smith hired on or about May 5. He also denied that Smith had authority to discharge two employees from the second shift. He cited his policy that only he hires or fires employees. The employees hired by Smith were James Donahue and Nancy Hartlett, who, in the week ending May 10, worked 32 and 24 hours, respectively. It is not deemed credible that Smith would have hired two employees on May 5 without the authority of McGrath, or that he would have terminated two employees on the second shift thereafter without direction from McGrath. McGrath also denied knowledge that the two additional employees were working on the second shift although they had worked 32 and 24 hours, respectively, during the week ending May 10. For these reasons I credit the testimony of Smith that he was authorized and directed by McGrath to hire two additional employees for the second shift and that he was directed by McGrath to discharge two employees on May 13; and, further, I credit the testimony of Smith that McGrath knew of Leonard Duncan's union activities and that McGrath intended to reduce his employee level in order to defeat any potential union majority among the employees.

A. *The Discharge of Leonard Duncan*

On May 15, shortly after Leonard Duncan reported for work, McGrath came into the work area and asked to speak to Michael Lawson, an employee. The two went to McGrath's office. About 20 minutes later Leonard Duncan was called into McGrath's office. McGrath asked Bennett and his secretary to join the meeting. McGrath asked Duncan if he had been smoking marijuana a week and a half ago in the company parking lot. Duncan denied smoking, and McGrath said, "You're fired." Duncan left the room, picked up his vacation pay and compensation for the day he had worked, and left the plant.[8]

B. *The Discharge of the Third Shift*

On May 15 Larry Bennett advised the supervisor and two employees of the third shift that they were being laid off. These were Calvin Duncan, third shift supervisor; Bela Giczi; and Anderson Mitchell. The reason for the layoff advanced by Bennett was that third-shift production did not warrant its continued operation. Calvin Duncan, the supervisor, was not absorbed into either the first or second shift.

C. *The Discharge of Rowena Wells*

Rowena Wells was employed as a machine operator on March 8, 1978. She was given a increase in salary in July 1979, and was subsequently denied raises during her tenure with Respondent. She allegedly was not advised of the reason she was not given a salary increase. Prior to May 14, 1980, she had had several problems with one or more of the supervisors. On one occasion she complained because a supervisor had unplugged her radio at her work station in order that he could use the outlet in the repair of a machine. Again she complained to McGrath that the production of the machine was defective and that her supervisor had contended that the production was acceptable. On May 14, 1980, she was told by Bennett that McGrath had ordered him to fire her. When she interrogated McGrath as to the reason for her

[8] Approximately a week and a half prior to May 15, Leonard Duncan and Michael Lawson were sitting in the company parking lot in a pickup truck at or about noon when McGrath drove onto the lot. McGrath alleges that at this time he had observed Duncan smoking what he believed to be marijuana. McGrath discussed the company baseball team with the two men and proceeded into the plant. No further action was taken by McGrath regarding this incident until the May 15 discharge of Duncan.

discharge she was advised that it was because she did not get along with her supervisor.

D. *The Discharge of Holly Joy Russell*

Holly Joy Russell was employed by Respondent in April 1979. On May 9, 1980, she advised McGrath that she was unhappy with the job and was going to quit. She told him that she felt that she was not getting enough authority. She had quit a "couple of times before." On May 12 Russell's mother called Respondent's office and advised that Russell would not be in to work that day because she was ill. Russell returned to work on May 13 and again on May 14. At the end of her shift on May 14, she was advised by Bennett that McGrath had told him to advise her that she was fired, since she had voluntarily resigned on May 9 and her resignation had been accepted.

Russell was reemployed by Respondent in September 1980.

E. *The Discharge of James Smith*[9]

On the afternoon of May 15 McGrath fired Smith for the alleged reason that Smith had hired and then fired two employees without authority. Smith alleged, and I have found, that the authority to hire the two employees as well as to fire two others was specifically given by McGrath. In the first instance, Smith desired two additional employees to work on the second shift. McGrath at first refused assent, but, when Smith showed that the total complement was below 30 nonsupervisory employees, McGrath acceded and authorized Smith to hire such employees. Subsequently, on May 13, McGrath directed Smith to discharge two employees. The discharge of Smith arose when Williams, McGrath's attorney, asked to see a list of employees. The list disclosed two names which McGrath said he did not know. He asked Smith who had given him authority to hire the two. On the basis of the alleged usurpation of this authority by Smith, McGrath stated that he had no alternative but to fire Smith. Williams suggested to McGrath that he reoffer employment to the two people who were fired and, if reemployment were accepted, that the two whom Smith had hired would have to be dismissed. Eventually, McGrath did rehire one of the two people Smith had laid off.

F. *The Discharge of Camille Smith*

On Friday, May 30, McGrath engaged in a conference with employee Camille Smith, the wife of James Smith. During this conversation he called her a "union spy" and a "double-crosser" and told her that her future days at Right-Gard were over. When Mrs. Smith asked him if by that he meant she was fired, he stated, "No." She asked if by that he meant that she was laid off; McGrath again stated, "No, I'm not going to make it that easy for you to collect unemployment." He allegedly also stated that, if she relayed what he had said to her, he would deny everything and that, in the event she was fired, he would state that it was due to poor attendance. Mrs. Smith left McGrath's office and told her supervisor that she was not feeling well. She left Respondent's plant and went to her husband's place of employment and related to him what had happened. She then went home and called her doctor because she was "quite upset."

Mrs. Smith returned to work on June 4, bringing a doctor's note indicating that she had been under a doctor's treatment Monday and Tuesday, June 2 and 3. She worked until around 10 o'clock on the morning of June 4, when she was called to the conference room by Bennett, who stated he had received a phone call from McGrath and as far as McGrath was concerned she had resigned from her employment on May 30. She requested a letter stating that she had been discharged. A letter was prepared which amounted to a letter of resignation, which Mrs. Smith refused to sign. She left the plant and did not return.

McGrath testified that the conversation with Mrs. Smith on May 30 concerned her employment at Right-Gard, her duties, and the proficiency with which she had performed. He stated that, upon terminating the conversation, she left the plant, and at 7 o'clock that evening McGrath received a phone call from James Smith, wherein Smith told McGrath that McGrath had accused him of being a "backstabber" and a "union spy." McGrath testified that on Wednesday, June 4, when advised that Mrs. Smith had returned to work, he was also told that the company had received a letter from the unemployment office disclosing that Mrs. Smith had accused McGrath of "terroristic threats and harassment." He was also told that the statement, a copy of which the Company received, was written in Smith's handwriting and signed by her. Due to this statement, McGrath told Bennett to advise Smith that "her resignation of Friday, as reported to us by the unemployment office, has been accepted." Mrs. Smith left the premises and did not return.

The version of this incident as testified to by Mrs. Smith is more credible than that related by McGrath. McGrath acknowledged that on the evening of May 30 he received a phone call from James Smith, Camille Smith's husband, wherein James Smith "accused" McGrath of calling him a "union spy" and a "double-crosser." It is also inconceivable that Mrs. Smith would state to the Unemployment Compensation Commission that McGrath had called her "union spy" and a "double-crosser" if untrue. The return of Mrs. Smith to employment on June 4, with a doctor's note for her absence on June 2 and 3 of that month, is consistent with her theory that, although McGrath made accusations against Mrs. Smith, he did not fire her. There is no explanation as to why, if McGrath's relation of the May 30 incident is accurate, Camille Smith left the plant without explanation. Such conduct is consistent with Mrs. Smith's testimony of the context of the May 30 meeting. It is also consistent with Mrs. Smith's testimony that she considered herself an employee through June 4.

[9] James Smith is not a discriminatee in this case. His discharge, however, is deemed a part of the total scenario depicting the overall scheme of Respondent.

VII. DISCUSSION

General Counsel contends that Respondent discharged seven employees because of union activity. Respondent contends that the discharges were necessitated and motivated solely by the Company's perceived fiscal condition at the time of the discharges.

On the face of the issues here presented, the principle announced in the *Wright Line* case appears applicable.[10] That principle requires that General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once that is established, the burden is upon the employer to prove its defense to the complaint that the same action would have taken place even in the absence of the protected activity.

The evidence established, and I have found, that Respondent's business levels are cyclical during the calendar year. This is due primarily to the nature of its prime product (street hockey equipment). In 1979 and 1980 the Company met the seasonal increase in business volume by the addition of a third shift. Except on one occasion in 1977, shortly after present management took control of the Company, no discharges of employees occurred during the cyclical downtrend of Respondent's business. The attrition of the employee complement is high and, in the past, apparently enabled the Company to adjust its labor force as business volume dictated.[11] In May 1980 Respondent's backlog records disclosed that the cyclical downtrend was somewhat deeper than for the same period in the prior year. These records were inaccurate due to their failure to reflect a substantial volume of orders which was allegedly unknown to Respondent until late June 1980. Because of the projection of such a level of orders, though inaccurate, Respondent contends that it elected to discharge several of its employees.[12]

The selection of dischargees was allegedly determined by a consideration of the employees' records. In the case of each dischargee Respondent put forth a reason for that employee's inclusion among those to be fired. Each case will be discussed hereafter.

The business decision made by Respondent in May 1980 to reduce its labor force thus appears to be valid even when its contrary past history and the expressed philosophy of its president that he was reluctant to discharge employees are considered.

However, I find that such was not the reason for the discharges. Respondent's president learned that the Union had begun its campaign to organize Respondent's employees on the afternoon of May 12, 1980. A few hours later McGrath made the first move to fire employees. While there is no evidence that he knew the identification of prounion employees, it is clear that, if a majority of employees were prounion, indiscriminate discharges would likely mitigate against the maintenance of that majority. It is concluded, however, that his selection of those to be discharged was not entirely indiscriminate. The complement of the third shift was comprised of Calvin Duncan, the supervisor of that shift; Bela Giczi; and Anderson Mitchell. Even though Calvin Duncan was held in sufficient high regard by Respondent to be engaged as a supervisor (especially on the third shift when other management personnel were not on duty), he was not absorbed into the other shifts. He is also the brother of Leonard Duncan, who was known to McGrath to have distributed union cards to employees, and thus Calvin Duncan was reasonably suspected to be prounion.

In order to veil its true motivation in the reduction of its labor force, Respondent alleged certain reasons for the discharge of each employee.

Leonard Duncan was allegedly fired for smoking marijuana 1-1/2 weeks prior to the date of his firing. No explanation for the delay in his discharge has been advanced. Clearly the reason proffered for Duncan's discharge is a pretense designed to mask the fact that Duncan was fired because he was a known union activist.

Rowena Wells was fired, allegedly, because she could not get along with her supervisors. This characteristic had existed for many months prior to her discharge. She had been warned on frequent occasions. No new episode of insubordination occurred about the time of her discharge.

Holly Joy Russell was fired because she "quit." It is admitted that she had "quit" several times before and had returned voluntarily with the apparent consent of management. On the occasion in question, after having "quit" again, she was not permitted to return and instead was fired.

The members of the third shift plus Leonard Duncan, Wells, and Russell were discharged on Wednesday, May 14, in the middle of Respondent's work week, which commences on Monday and ends on Friday. The motivation advanced by the Respondent for such discharges is not consistent with the percipitous nature of the firing and the absence of any notice of impending discharge to any of these employees. Discharge for economic reasons was not stated by Respondent to any fired employee.

I find such conduct by Respondent to be motivated by Respondent's effort to discourage union activity and more specifically to destroy the anticipated union majority among the "unit" which would be entitled to vote in the upcoming union election.

The foregoing conclusion is more evident when the discharge of Smith, the second-shift supervisor is considered. Respondent had provided a list of employees whom it contends are members of the unit of employees sought to be represented by the Union and thus eligible to vote in the organizational election. Among these employees are Calvin Duncan, Richard Fitzgerald, Dennis Pickering, and Wentworth Vedder. Each of these employees is described in this record as a supervisor or a superintendent, yet on the list they are described as

[10] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[11] Respondent's payroll record for the period ending May 10, 1980, reported 35 active and 20 terminated employees for a total complement during the period of 55 employees. Such a churning of personnel strongly suggests that employee complement adjustments in prior business downswings were accomplished by attrition. Also, McGrath acknowledged that he was loath to fire employees because of general economic conditions.

[12] McGrath testified that, if the backlog had been correctly reflected, no employee would have been fired for this reason, notwithstanding an increase of $3,000 in its monthly cash outflow.

"direct labor." It is clear that Respondent is attempting to qualify supervisory personnel as members of the unit in order to prevent a prounion majority. In view of this, it would mitigate against Respondent's position if one of these "supervisors," Smith, had the authority to hire and fire nonsupervisory employees. Thus, McGrath denied such power or authority was entrusted to Smith, a supervisor, who was in the same capacity as Duncan, Fitzgerald, Pickering, and Vedder. McGrath thus denied that Smith had such authority and fired him allegedly for usurping authority. The discharge of Smith further seemed harsh under the circumstances alleged by McGrath. Smith was a supervisor on the second shift. He was requested by McGrath to recommend the elimination of the third shift and to assign reasons therefor, suggesting that Smith was of sufficient caliber that McGrath would respect his opinion. Further, Smith's discharge was not alleged to be "for economic reasons." The discharge of Smith was an attempt to support Respondent's position that such "supervisors" are really "direct labor" and members of the unit sought to be represented by the Union. Although Smith is not a discriminatee here, this episode supports the conclusion, which I drew, that Respondent's plan was to overcome a union majority in the forthcoming election and the discharges of these employees was motivated solely in furtherance of such plan.

The discharge of Camille Smith, while later in the sequence of events, comprises a continuation of Respondent's campaign to defeat the Union. McGrath discharged Camille Smith after he had laid the foundation which caused her to voluntarily leave the Company. His denial of her testimony regarding the dialogue of the May 30 conference is inconsistent with her having left the plant after the conference and telling both her husband and a representative of the Unemployment Compensation Commission that McGrath had threatened and harassed her. After discharging Camille Smith's husband, it was reasonable to expect Mrs. Smith to be prounion. Since no other reason for her discharge existed, McGrath undertook to coerce her to leave in an apparent voluntary manner. In this he succeeded when she filed for unemployment compensation and charged McGrath with the threat and harassing statements ascribed to him. He then had what he deemed a valid reason to discharge her. This conduct comprises a constructive discharge and was motivated by a continuing campaign to defeat a union majority in the forthcoming election.

In view of the foregoing, the principle set forth in *Wright Line, supra*, does not apply. I find that there is no dual motive of Respondent but rather the single motive set forth above which underlies the discharges of the seven employee-discriminatees.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and the Union is a labor organization within the meaning of the Act.

2. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by:

(a) Discharging seven employees because of actual or suspected union activity at Respondent's plant.

(b) Discharging seven employees in an attempt to prevent a prounion majority among members of the unit sought to be represented by the Union.

3. The aforecited practices are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, it shall be ordered that it cease and desist therefrom, or from engaging in any similar or related conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby recommend the following:

ORDER[13]

The Respondent, Right-Gard Corporation, Montgomeryville, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because of actual or suspected union activity.

(b) Discharging or laying off any employee in an attempt to prevent a prounion majority among members of any unit now or in the future seeking to be represented by a union.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Leonard Duncan, Rowena Wells, Anderson Mitchell, Calvin Duncan, Bela Giczi, and Camille Smith immediate and full reinstatement to his or her former job or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to the seniority or other rights and privileges enjoyed by each, and make each of the above and Holly Joy Russell whole in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), for loss of pay and other benefits lost by reason of their discriminatory discharges.

(b) Preserve and, upon request, make available to the Board or to its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

(c) Post in conspicuous places at its plant copies of the attached notice marked "Appendix."[14] Copies of the

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the employees, eligible to vote, are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Employer has taken to comply herewith.